No. 89-7645

In The

Supreme Court of the United States

October Term, 1990

DIONISIO HERNANDEZ,

Petitioner,

v.

NEW YORK,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of New York

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a prosecutor's proffered explanation that prospective Latino jurors were struck from the venire because he suspected they might not abide by official translations of Spanish language testimony constitutes an acceptable "race neutral" explanation under *Batson v. Kentucky*, 476 U.S. 79 (1986)?

2. Where a trial court has accepted the prosecutor's proffered explanation as being race neutral, what standard of review is to be applied by reviewing Courts?

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OPINIONS BELOW

The opinion of the New York State Court of Appeals is reported at 75 N.Y.2d 350, 553 N.Y.S.2d 85, 552 N.E.2d 621 (1990) and found in the Joint Appendix at A26.[1] The opinion of the New York State Appellate Division is reported at 140 A.D.2d 543, 528 N.Y.S.2d 625 (2d Dept. 1986) and is found in the Joint Appendix at A24. The opinion of the New York State Supreme Court is not

[1] Citations to the Joint Appendix shall be indicated by "A" and the page number.

reported, and the transcript of the oral decision is found in the Joint Appendix at A2.

JURISDICTION

The jurisdiction of the Court is based on 28 U.S.C. § 1257(a). The petition for certiorari was filed on May 23, 1990, and certiorari was granted on October 9, 1990. A46.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourteenth Amendment of the Constitution of the United States which provides in pertinent part:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Dionisio Hernandez was charged in a New York State criminal proceeding with attempted murder, assault and criminal possession of a weapon. The charges arose from an incident in which it was alleged that petitioner attempted to kill his fiancée and her mother. Two patrons of a restaurant were wounded in the incident.

Jury selection took place on November 3-7, 1986. There was no transcript maintained of the voir dire examination. On November 6, 1986, after the examination of sixty-three jurors had been completed and nine jurors

had been selected, defense counsel objected to the prosecution excluding all potential Latino jurors by the exercise of peremptory challenges. A2. In explaining his reasons for the exercise of four of his peremptory challenges, the prosecutor stated as to two of the Latino jurors:

> [M]y reason for rejecting these two is I feel very uncertain that they would be able to listen and follow the interpreter. * * * We talked to them for a long time: the Court talked to them, I talked to them. I believe that in their heart they will try to follow [the interpreter's translation], but I felt there was a great deal of uncertainty as to whether they could accept the interpreter as final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses, and I didn't feel, when I asked them whether or not they could accept the interpreter's translation of it, I didn't feel that they could. They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter, and I feel that in a case where the interpreter will be for the main witnesses, they would have an undue impact upon the jury.

A3-4. Both jurors, however, ultimately affirmed that they would accept the interpreter's interpretation and neither was challenged for cause. A9-10. The prosecutor explained that the other two Latinos who had been peremptorily challenged had family members that had been or would be prosecuted by his office. A6-7. The trial judge made no specific finding that the proffered explanations were nondiscriminatory and, without probing the reasons given, denied the petitioner's motion. A12. The empaneled jury included no Latinos.

Following a trial, the judge dismissed the assault charges involving the two men in the restaurant. The jury returned a guilty verdict on the charges of attempted murder and criminal possession of a weapon.

On appeal, the New York State Supreme Court, Appellate Division held that the petitioner had made out a prima facie case of discrimination. However, the court lacked a transcript of the voir dire and therefore, without any analysis, concluded that the prosecutor had stated nondiscriminatory reasons for his challenges. A25. It affirmed the conviction.

The New York State Court of Appeals also affirmed the conviction, but by a divided court. The majority opinion, joined by four judges, found that there was a prima facie case of discrimination. However, it found, under *Batson v. Kentucky*, 476 U.S. 79 (1986), that the prosecutor had stated a race neutral reason for the challenges to the Latino jurors. The majority held that the two jurors had given the prosecutor a "basis to believe from words and actions that their Spanish language fluency might create difficulties in their accepting the official court interpreter's translation of the testimony of the Spanish-speaking witnesses." A28. It gave great deference to the trial court's determination of nondiscrimination.

> [I]t was for the trial court to determine if the prosecutor's explanation was pretextual or real — and justified by the answers and conduct of the two jurors during voir dire. Indeed, the Supreme Court itself recognized that resolution of these issues springing from the *Batson* test were rightly reposed in fact-finding courts entitled to "great deference" with customary appellate oversight . . . That reasonable minds could disagree at this level of review on this record demonstrates the wisdom and propriety of the

> Supreme Court's and our view that, in the distribution of functions among courts, deference generally to the fact-finding and evidence-viewing court is warranted in these circumstances.

A31-32 (citation omitted).

One judge, in a concurring opinion, invited the New York State legislature to consider eliminating or limiting the use of peremptory challenges. A36-37.

Two judges in dissent urged a reversal of the conviction. A37-45. The dissent argued that the appellate courts could not simply defer to the trial court's findings:

> [I]f our review of the prosecutor's conduct is to become merely a matter of identifying undisturbed findings of fact with some support in the record, or deferring to the trial court and Appellate Division or to the prosecutor's assertion of some ostensibly neutral ground, then the role of this court in defining and protecting defendant's nascent constitutional right has been virtually surrendered at the outset. While the Trial Judge's observations of the unfolding events are of course important, there is still a significant role for this court in clearly articulating the standard and then determining the law question whether the People have satisfied that standard.

A39-40. On their review of the record, they would have found a violation of the Equal Protection Clause.

The dissent found that the prosecutor's Spanish language-based reason for his challenges was inherently suspect because of the disparate impact on Latinos. "Consequently, a reason that is grounded largely in speculation rather than facts uncovered in voir dire examination, as revealed by the record, should not be accepted." A41 (citations omitted). They argued that because both jurors had satisfied the trial court that they would accept the official court translation, the majority was incorrect in

asserting that the case involved whether the jurors would "decide [the] case on the official evidence before them." A41. Moreover, there was additional indicia of discrimination since the prosecutor failed to demonstrate that he had sought to determine whether non-Latino jurors also spoke Spanish. A42. Therefore, the dissent found that there was an insufficient basis in the record to support the trial court's finding that there was no violation of *Batson*.

The dissent concluded by describing the constitutionally intolerable impact of the majority's ruling:

> Where, as here, a language-based reason for exercising peremptory challenges is intimately linked to ethnicity and has the same impact as one that is, in fact, ethnically based, the People's offer of a neutral explanation must be subjected to enhanced scrutiny. . . . Otherwise, absent that somewhat more demanding standard, the prosecution's removal of all persons of a certain ethnic group, whether intentionally or not, can all too readily be justified by the mere recitation of a language-based reason. In this State, with its varied and often concentrated ethnic populations, the inevitable effect on the composition of juries of permitting such language-based justifications without close inspection would be intolerable.

A43.

SUMMARY OF THE ARGUMENT

This case will determine whether *Batson* will have any meaning and effect for Latinos. The reason given by the prosecutor in this case for excluding Latino jurors was based on the Spanish language ability of the jurors. Language based reasons are integrally linked to national

origin. Therefore, the prosecutor's explanation was a per se violation of the Equal Protection Clause. In Brooklyn, where the trial took place, over 96% of all Latinos could have been excluded based on their ability to speak Spanish. If Spanish language ability can be used to exclude Latinos from juries, Latinos throughout the country will be virtually eliminated from cases where there is a chance of Spanish testimony.

The error of the New York courts was their failure to recognize that the reason given by the prosecutor was based on the Spanish language ability of the jurors. The prosecutor did not say so explicitly, but his explanation revealed that this was his basis. He stated that he had doubts whether the jurors could follow the interpreter's interpretation of proposed Spanish language testimony. He stated that the jurors had answered questions about their obligation to follow the interpreter by saying that they "would try;" that is, try to disregard what they heard in Spanish from the witness and rely only on what they heard in English from the interpreter. The jurors ultimately affirmed that they would accept the interpretation. The prosecutor stated that the jurors' initial "hesitant" answers led him to speculate that although the jurors were willing to follow the interpretation, they "could" not comply. The trial court and the appellate courts in New York found that the prosecutor's reliance on his speculations about the jurors were not language-based, and therefore they were neutral reasons under *Batson*.

It is apparent, however, that the prosecutor's reasons were based on the Spanish language ability of the jurors. The jurors' "I-will-try" answers to questions about the interpreter are the natural and honest responses. In essence, the jurors had been asked whether they could

parse out and disregard what they had heard in Spanish from the witness and rely only on what they heard in English from the interpreter. It is inherently a difficult undertaking. As this Court has recognized in other settings, *see, e.g., Bruton v. United States*, 391 U.S. 123 (1968), being able to separate out and disregard something heard in court is a complex mental gymnastic. It is particularly difficult for a bilingual juror to disregard what comes from the lips of the witness and rely only on what is often a less complete interpretation, in both words and nonverbal indicia of truthfulness, such as pauses and emphasis. The jurors honestly answered, as would any bilingual juror, that they would try not to rely on what they heard in Spanish. As a matter of law and jurisprudence, it is presumed that they will follow the court's instructions and rely only on the English language interpretation. The jurors affirmed that they would.

Thus, the "I-will-try" answers are a function of the Spanish language ability of the jurors and the difficulty of what is being asked. Because the answers are based on language ability, these two Latino jurors are not distinguishable from other Latino bilingual jurors. The same response would be given by all bilingual persons. Indeed, in this case both jurors answered in the same way. The court below erred in not recognizing that the prosecutor's reasons were language-based and therefore violative of the Fourteenth Amendment. Prosecutors can rely on the explanation offered in this case any time they want to exclude Latino jurors. If the decision is allowed to stand, *Batson* will essentially not apply to Latinos.

The Fourteenth Amendment's Equal Protection Clause cannot be so easily evaded; particularly, where there is a nondiscriminatory alternative to satisfy the

alleged concerns of the prosecutor here. As is done in many jurisdictions, including New York, bilingual jurors can be instructed by the court that if they hear any mistakes in the interpretation they should pass a note to the bailiff. Then the court can determine if the mistake is material; and if it is, seek to have it clarified. There is no need to exclude Latinos from juries because they speak Spanish.

Plenary review is appropriate to correct, as a matter of law, this per se violation of *Batson*. Furthermore, even if there is no per se violation, independent plenary review is the standard of appellate review required by the Fourteenth Amendment of all *Batson* claims. This Court, in a series of cases beginning with *Norris v. Alabama*, 294 U.S. 587 (1935), has held that plenary review was the required standard for claims of jury discrimination. Due deference is given to the trial court's findings of historical and subsidiary facts including findings of credibility, but the appellate court must make its own independent decision as to whether the jury selection process is race neutral. It is only through independent review that the equal protection standards for neutrality can be set and enforced.

Claims of jury discrimination strike at the very integrity of the judicial system. They are too important to be left to the trial courts alone. The same values that this Court was protecting in *Norris* and its progeny are at issue in *Batson* cases. Plenary and independent review should be the standard for all appellate courts.

This Court should reverse the New York State Court of Appeals and find a per se violation of *Batson*. Alternatively, because the New York State Court of Appeals failed to provide plenary review and because there were

no specific findings of fact by the trial court nor any record of the voir dire, this matter should be reversed and remanded to supplement the record and review the determination under the correct standard.

ARGUMENT

POINT I

THE PROSECUTOR'S BASIS FOR CHALLENGING LATINO JURORS WAS DISCRIMINATORY ON ITS FACE

Introduction

The real issue presented by this case is whether Latino jurors can ever sit in judgment in criminal cases in which there may be testimony in Spanish.[2] If prosecutors are permitted to peremptorily challenge Spanish-speaking jurors because of their ability to speak Spanish, very few juries will include Latino jurors. For example in Brooklyn, where this trial took place, approximately 96%[3]

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[2] This includes all cases in which there are witnesses who will testify in Spanish. It includes, as well, all cases in which there is a Spanish speaking defendant because he or she may decide to testify. Nationally, as of 1975, 42% of all Latinos claimed that Spanish is their first language, the language that they usually use. Estrada, Leobardo F., *The Extent of Spanish/English Bilingualism in the United States*, Aztlan, Int'l J. of Chicano Studies Research, Vol. 15, No. 2, Fall 1984 at 381. Therefore, in cases in which any Latino is involved there is over a 40% chance that an interpreter may be used.

[3] This figure is based on the comparison of 1980 Census data reflecting the total number of Latinos in Brooklyn (Kings County, New York) with the number of persons reporting that Spanish is spoken in the home. 1980 Census of Population, 1

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of all Latinos speak Spanish and could have been excluded from hearing this case.

A. The Prosecutor Based His Challenges On The Spanish Language Ability Of The Latino Jurors

The prosecutor in this case used his peremptory challenges to exclude all Latino jurors from the jury. Under *Batson v. Kentucky*, 476 U.S. 79 (1986), a prima facie case of discrimination had been established. A31. Once there is a prima facie case, a prosecutor must provide clear and specific nondiscriminatory reasons related to the case for the exercise of these peremptory challenges. *Batson*, 476 U.S. at 98 and n.20. As to two of the challenged Latino jurors, the proffered explanation was based on the jurors' Spanish language ability. Because of the integral relationship between speaking Spanish and being Latino, a decision based on Spanish language is tantamount to a decision based on Latino national origin.[4] *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926); and, *see*, *Lau v. Nichols*, 414 U.S. 563 (1974); *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1042-1043 (9th Cir 1988), *vacated as moot*, 109 S. Ct. 1736 (1989); *Olagues v. Russoniello*, 797 F.2d 1511, 1520-21 (9th

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General Social and Economic Characteristics, Vol. 34 (N.Y.) tables 51 and 172 at 651, 923. It assumes that persons who speak Spanish at home are Latinos.

Nationally, according to one study, 78% of all Latinos spoke Spanish. Estrada, Leobardo F., *The Extent of Spanish/English Bilingualism in the United States*, Aztlan, Int'l J. of Chicano Studies Research, Vol. 15, No. 2, Fall 1984 at 383.

[4] The majority opinion below accepted this a fortiori connection between language and ethnicity, but failed to decide the case on that basis. A31.

Cir. 1986), *vacated as moot*, 484 U.S. 806 (1987).[5] It was therefore a facially discriminatory reason and a per se violation of *Batson* and the Fourteenth Amendment. *Id.*; *and, see, United States v. Lopez*, 86 CR. 513 (N.D. Ill. 1987) (Lexis 9544 U.S. Dist.)[6]

However, the prosecutor did not explicitly rely on the Spanish speaking ability of the jurors. Rather he questioned whether these two jurors could accept the court interpreter's interpretation[7] of proposed Spanish language testimony:

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[5] The integral connection between language and national origin is also well established in statutes and regulations. See, e.g., 20 U.S.C. § 1703(f) (prohibiting discrimination on the basis of national origin by the failure of schools to take appropriate action to overcome language barriers in order to provide equal services); 42 U.S.C. § 1973aa-1a (providing voting rights protection to "language_minorities"); 29 CFR 1606.6 (prohibiting national origin discrimination in employment on the basis of language).

[6] In *Lopez*, a defendant sought to have an exclusively bilingual Spanish-speaking jury because the accuracy of translations of out-of-court tape recordings of Spanish-language conversations was at issue. The Court held that such a jury would be discriminatory in violation of 18 U.S.C. § 1862:

> § 1862 prohibits the exclusion of jurors based on their national origin, and while it is true that many people are bilingual who are not Hispanic, there can be no question that the majority of Spanish-speaking jurors in the Chicago area are Hispanic . . . [T]he exclusion of jurors who only speak English would . . . be statutorily prohibited . . .

Id. 86 CR 513 (N.D. Ill. 1987) (Lexis 9544 U.S. Dist.)

[7] Although the word "translation" is often used, technically a translation describes a written document that has been

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> [M]y reason for rejecting these two is I feel very uncertain that they would be *able* to listen and follow the interpreter. * * * I didn't feel, when I asked them whether they could accept the interpreter's translation of it, I didn't feel that they *could*. They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter.

A3-4 (emphasis added). Based on the jurors' answers to voir dire questions, the prosecutor speculated that the jurors lacked the *ability* to disregard the Spanish language testimony.[8] The majority decision below correctly recognized that the jurors' "hesitancy" or "I-will-try" answers were based on their Spanish language fluency:

> The prosecutor further explained that he challenged the other two jurors . . . because each had given him basis to believe from words and actions that *their Spanish language fluency* might create difficulties in their accepting the official court interpreter's translation of the testimony of the Spanish-speaking witnesses.

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translated from one language to another. An interpreter converts an oral statement in one language into an oral statement in another language.

[8] The prosecutor did not question the two jurors' willingness to be bound by the interpreter's interpretation; but because of their Spanish language fluency, he questioned their ability to do it. He stated that he believed that the Latino jurors desired to follow the instructions regarding the interpreter: "I believe that in their heart they will try to follow it." A3. However, he questioned the jurors' actual capacity to follow the court's instructions: " . . . I feel very uncertain that they would be *able* to listen and follow the interpreter." *Id.* (emphasis added).

A27-28 (emphasis added). Thus, the actual basis of the challenge was the jurors' Spanish language ability.[9] Nevertheless, the court below found that the prosecutor's reason was race neutral because he did not rely directly on Spanish language ability, but on his belief that the jurors could not follow the interpreter's interpretation of testimony. A31.

The error below was the failure to recognize that the "I-will-try" answers of these two Latino jurors, upon which the prosecutor based his challenges, were themselves based on Spanish language ability and upon the questions that were asked. Any honest bilingual juror would have answered the prosecutor in the exact same way. In essence, these jurors had been asked whether they could reject what they hear in Spanish and only rely on what they hear in English from the interpreter.[10] To comply with what they had been asked to do, the jurors must first be able to separate out what is heard and understood in Spanish from what is heard and understood in English and then disregard the Spanish language testimony. This Court on several occasions has recognized the difficulty that jurors face in following

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[9] The prosecutor did claim that, in responding to his questions, these jurors avoided eye contact with him. A3. However, Latinos often out of respect for authority avert their eyes. See, Final Report of the New Jersey Supreme Court Task Force of Interpreter Translation Services, *Equal Access to the Courts for Linguistic Minorities*, (May 22, 1985) at 33. His misunderstanding of this cultural practice is part of the unconscious racism that often underlies peremptory challenges. See, *Batson*, 476 U.S. at 106 (Marshall, J. concurring).

[10] *See, e.g., Santana v. New York City Transit Authority*, 132 Misc.2d 777, 505 N.Y.S.2d 775, 778 (Sup.Ct. 1986).

instructions that require them to parse out certain evidence and disregard it. *See, e.g., Bruton v. United States*, 391 U.S. 123, 132-133 (1968); *Jackson v. Denno*, 378 U.S. 368, 388 (1964). These Latino jurors were asked to do the same thing in disregarding the Spanish language testimony. It is inherently a difficult task, and the jurors honestly answered that they would try to do it. At the end of the voir dire questioning process, these jurors had affirmed that "they could listen to what the interpreter said and not let their own evaluation of what the witness says be the answer that they would utilize." A9-10. The prosecutor acknowledged that the jurors could not be challenged for cause. A9. Therefore, it was the jurors' initial "hesitant" responses to these difficult questions that allegedly led to their exclusion.

As bilingual people, the jurors knew from their own experience of seeing subtitled Spanish-language movies, reading books in Spanish and English or interpreting for their friends or family that understanding what is said in the original language is probably more complete, in both words and nonverbal indicia of truthfulness, and perhaps more accurate than the English interpretation.[11] Thus in

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[11] As one court has noted:

> In any trial where an interpreter's services are required, the party/witness, at the outset, is placed at a disadvantage. Much of the impact and demeanor of the party/witness becomes obscured by the presence of an interpreter. The jury's attention tends to become transfixed on the interpreter, an unexpressive participant in the trial.
>
> English is a very expansive and expressive language and an interpreter may at times have to make a choice between two or more words which are

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affirming their willingness to follow the instruction to disregard the Spanish-language testimony, these Latino jurors naturally and honestly responded that "they would try" to do it rather than an initial unqualified and emphatic affirmative response. Following such instructions is a difficult task of "mental gymnastic[s]." *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932). It is not that it cannot or will not be done. It is assumed, as a matter of law and jurisprudence, that the jurors will do it. *Bruton*, 391 U.S. at 135. But, the doing of it is difficult, and, therefore, their honest answer is that they will try. Significantly, not only one but both jurors had the same "hesitant" response. Their answers to the voir dire questions, based on their "Spanish language fluency" (A28) are the same as would be expected from every honest bilingual Latino.

The same type of "hesitancy," exhibited by these two jurors or other bilingual Latinos, would exist if jurors generally were each questioned about their willingness and ability to follow other court instructions to disregard

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> similar in definition. An interpreter tries not to put words in the most emphatic way unless absolutely required. Inevitably, due to the spontaneity of the interpreter's translation or the lack of an exact translation of a word, it is possible that the interpreter may not choose the best word possible, thus causing a deviation in the intended communication to the jury. However, the use of a specific word can have a significant impact on what is being communicated.

Santana, 505 N.Y.S.2d at 779.

statements made in court.[12] For example, after evidence of a defendant's prior criminal record is admitted by a Federal District Court pursuant to Rule 404 of the Federal Rules of Evidence, the jury is instructed:

> Evidence that an act was done at one time or on one occasion is not any evidence or proof that a similar act was done at another time or on another occasion. That is to say, evidence that a defendant may have committed an earlier act of like nature may not be considered by the jury in determining whether the accused committed any act charged in the indictment. Evidence of these past acts is admitted only to show intent, knowledge or lack of mistake.

See, e.g., United States v. Reese, 568 F.2d 1246, 1251 (6th Cir. 1977). If the trial judge then asked each juror whether he or she could follow that instruction and disregard the

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[12] One observer of mock juries used to evaluate the impact of an interpreter on a juror's understanding of testimony noted:

> [Hispanic mock jurors] in fact do pay attention to Spanish language testimony as given by a testifying witness. This is something the Court officially tells bilingual jurors not to do, something akin to a judge telling a jury to disregard testimony that it has heard but that has been ruled inadmissible after an attorney's objection has been sustained. Clearly, what jurors are told to disregard after they have heard it cannot assumed to be wiped out entirely from their memory. Similarly, it would be highly difficult for a bilingual person to blot out speech he understands simply because he has been told to do so, especially since he knows that the *real* testimony is not that of the interpreter, but that coming from the lips of the person who is answering the attorney's questions.

Berk-Seligson, Susan, *The Bilingual Courtroom*, Univ. of Chicago Press (1990) at 167-168 (emphasis in the original).

past criminal acts in judging the guilt or innocence of the defendant, the honest and natural response of a juror would be, "I will try."[13] This response reflects both the willingness of the juror to comply and the difficulty of the task. Of course, jurors are not asked, and it is assumed that they actually follow the court's instructions. *See, Bruton.*

Here, only Latino jurors or Spanish-speaking jurors are asked this type of question. Their responses to the voir dire questions are no different from what other Latino bilingual jurors would have answered. An "I-will-try" response is purely a function of language ability. Thus, these Latino jurors were singled out and peremptorily challenged here because of their Spanish language ability, an integral element of their national origin. The New York Court of Appeals erred in not treating the prosecutor's explanation as impermissibly based on language and national origin in clear violation of *Batson*.

B. There Is A *Batson* Violation Regardless Of The Prosecutor's Good Or Bad Faith

A violation of the Equal Protection Clause does not turn on the lack of good faith, but rather on the reliance on race as a factor. *City Of Richmond v. Croson*, 488 U.S. 469 (1989); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Hernandez*

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[13] This Court has recognized that other types of questioning of jurors will naturally lead to qualified affirmative responses. *Adams v. Texas*, 448 U.S. 38, 49-51 (1980); *see, similarly, People v. Turner*, 42 Cal.3d 711, 230 Cal.Rptr. 656, 726 P.2d 102 (1986).

v. Texas, 347 U.S. 475, 481-482 (1954).[14] Regardless of good faith or bad faith, a decision to exclude jurors based on their race or ethnicity violates the Equal Protection Clause of the Fourteenth Amendment. *United States v. Wilson*, 884 F.2d 1121 (8th Cir. 1989) (en banc)[15]; *Thompson v. State*, 548 So.2d 198 (Fla. 1989); *State v. Cantu*, 778 P.2d

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[14] This Court neither in *Swain v. Alabama*, 380 U.S. 202 (1965) nor in *Batson* imputed any malice or bad faith to prosecutors who relied on the race of the juror in exercising peremptory challenges in any individual case. In fact, the *Swain* Court found race-based exclusions in individual cases an acceptable practice:

> It [the peremptory challenge] is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be.

Swain, 380 U.S. at 220-221 (footnotes omitted); *see similarly, id.* at 211-212. *Batson* simply held that the Fourteenth Amendment Equal Protection Clause made race an impermissible factor in individual cases. Prosecutors could no longer rely on the previously acceptable assumption that "black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson*, 476 U.S at 89.

[15] In *Wilson*, in response to a prima facie *Batson* violation, the prosecutor stated that an African American juror who was peremptorily challenged lived in the same town as the defendant, who was also African American. He argued that the juror would be influenced by the defendant or contacted by his friends. He said that a white juror from the same town, who was not challenged, would be less likely to be influenced or contacted because she was white. He testified that race is "like being a member of a lodge." *Wilson*, 884 F.2d at 1124. The Eighth Circuit found that the explanation was not race neutral.

517 (Utah, 1989); *Minniefield v. State*, 539 N.E.2d 464 (Ind. Sup. Ct. 1989); and *see, People v. Johnson*, 22 Cal.3d 296, 148 Cal.Rptr. 915, 583 P.2d 774 (1978).[16] The challenges of

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[16] In *Minniefield* and *Johnson*, prosecutors exercised their peremptory challenges to remove African Americans because of their concern that African American jurors would react negatively to a prosecution witness who used racial epithets. Despite this case-related, ostensibly good faith reason for the challenges, the courts nevertheless found violations of the Fourteenth Amendment or their own constitutions. The challenges were all based on race.

Similarly the Second Circuit Court of Appeals, in construing the Sixth Amendment, held that although race may be case-related, it serves no governmental purpose and is violative of the Constitution:

> In a case where a black defendant has been charged with a crime that has aroused racial passions, one may believe that whites *qua* whites are more likely than blacks *qua* blacks to convict; this, however, does not bespeak of a greater objectivity so much as it does a greater propensity to convict: Obviously, the responsibility of the state and its prosecutor is not to secure a conviction at all costs; it is to see that justice is done, and the constitutional wisdom is that justice is best served by a jury that represents a cross section of the community, not one from which cognizable groups have been systematically eliminated because of their group affiliations.

McCray v. Abrams, 750 F.2d 1113, 1131 (2d Cir. 1984), *vacated and remanded for further consideration in light of Batson* 478 U.S. 1001 (1986). *Batson* says the same thing about the overriding importance of nondiscrimination under the Fourteenth Amendment. *Id.*, 476 U.S. at 86. Case related peremptory challenges that enhance convictions cannot be based on race and national origin. *State v. Townes*, 220 N.J. Super. 38, 531 A.2d 381 (1987).

these two Latino[17] jurors were based on national origin regardless of the motives of the prosecutor. The prosecutor's reliance on the jurors' honest and natural

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[17] Even if Spanish-speaking non-Latinos are similarly challenged, it does not change the analysis. The use of Spanish language has been the basis of many cases of discrimination against Latinos. See, e.g. *Gutierrez*, 838 F.2d 1031. Language ability is related to national origin in much the same way as skin color is often connected to race. Spanish language ability is not totally inclusive of all Latinos, nor is a dark complexion totally inclusive of African Americans. (Plessy of *Plessy v. Ferguson*, 163 U.S. 537 (1896) was described as "seven eighths Caucasian and one eighths African blood; that the mixture of colored blood was not discernible in him". *Id.*, 163 U.S. at 541). Similarly neither language nor color are totally exclusive of other national origin or racial groups. As there are some non-Latinos that speak Spanish, there are persons of black and brown skin color who are not African Americans. Nevertheless, exclusion of jurors based on Spanish language ability is a per se violation of *Batson*, in the same way exclusion based on skin color would be for African Americans. For example, if there was an issue in a case of the accuracy of eye witness testimony of a white witness identifying an African American defendant, a prosecutor could not peremptorily challenge all African Americans because of his belief that African Americans may doubt the identification testimony of a white. Those discriminatory challenges would not be neutralized if in addition the prosecutor challenged a dark complexioned Pakistani, Sicilian, or Puerto Rican, for the same reason. *But see, State v. Pemberthy*, 224 N.J. Super. 280, 540 A.2d 227, *appeal denied*, 11 N.J. 633, 546 A.2d 547 (1988) (The New Jersey intermediate appellate court accepted as race neutral a prosecutor's peremptory challenges of both Latino and non-Latino jurors based on Spanish language ability. The major issue at trial was the accuracy of translations of out-of-court statements of the defendants. Both parties were offering expert testimony on the translation.)

"hesitancy" as the basis for the challenges, does not neutralize the reason for the challenges.

While there may be reason to challenge the credibility and the good faith of a prosecutor who relies on reasons like the one offered in this case,[18] it is not necessary to do so. It is sufficient that this Court find that the proffered reasons are based on Spanish language ability and thus national origin. It is a per se violation of the *Batson* and the Fourteenth Amendment.

C. A Finding Of A Per Se Violation Protects The Efficacy Of *Batson*

This Court's finding of a per se violation of the Fourteenth Amendment here is necessary to protect the efficacy of *Batson*. Because the so-called "hesitancy" of a bilingual juror in answering questions about the duty to disregard the Spanish language testimony of a witness is natural and honest, a prosecutor can readily rely on it any time he or she wants to exclude Latino jurors. As it was recognized in *Batson*, prosecutors have often assumed that minority jurors will be more sympathetic to minority defendants than they will be to the State. *Id.*, 476 U.S. at 97, and 101 (White, J. concurring) ("It appears, however, that the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread . . . "). Although this assumption was condemned

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[18] The dissent below would have found that the prosecutor's reasons were pretextural. A41-43. The prosecutor cited nothing in the record that showed that these two jurors would either be partial to the defendant or against the State. Thus, it is fair to conclude that the prosecutor simply did not want Latinos to judge the conduct of another Latino. A reason that is specifically rejected by *Batson*. *Id.*, 476 U.S. at 97.

as discriminatory in *Batson*, its accuracy was not refuted. See footnote 14 *supra*. Thus, there is a high likelihood that prosecutors, in an effort to win their cases, will continue this practice and exclude Latinos. If the decision below is allowed to stand, prosecutors will have a ready made "nondiscriminatory" explanation: the juror's "hesitant" responses to questions about following the interpreter.[19] In most cases, it would be nearly impossible to demonstrate that this explanation, as a factual matter, is a pretext for discrimination. The explanation for these peremptory challenges would all be based on the actual, record-based "hesitancy" of bilingual jurors. *Batson* will provide no protection for Latino defendants or Latino jurors.

This Court should not let history repeat itself. It took the Court 21 years to recognize that *Swain* had created an

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[19] As the dissenting opinion in the court below stated:

> Here, the prosecutor's "neutral" explanation is one that necessarily produces disparate impact on a single ethnic group. The statistics before us indicate that, in Kings County, virtually all Latinos speak Spanish at home. . . . [We] are advised that the State court system employs 113 Spanish translators – presumably rendering accurate translations in court proceedings – who are engaged more than 250 times a day. Accepting as a sufficient explanation that the prosecution will offer the testimony of a witness whose native tongue is Spanish – whether or not an interpreter is required – too easily circumvents the People's obligation and the defendant's right, and allows the prosecutor to do by indirection what can no longer be done directly.

A40 (dissenting opinion); *see also, Smith v. Texas*, 311 U.S. 128, 132 (1940) ("If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand.").

impossible evidentiary burden and that discrimination was continuing unabated. *Batson*, 476 U.S. at 92. This Court should act now to protect Latinos and give substance to the words of *Batson*. Requiring a criminal defendant to prove pretext when language based reasons are given establishes an almost insurmountable evidentiary burden. As the dissent below stated: "In this State [or country], with its varied and often concentrated ethnic populations, the inevitable effect on the composition of our juries of permitting such language-based justifications . . . would be intolerable." A43 (dissenting opinion).

D. A Finding For Petitioner Will Not Curb The Legitimate Use Of Peremptory Challenges

By finding a per se violation in this case, this Court will not interfere with the traditional purpose of peremptory challenges, to obtain an impartial and unbiased jury:

> Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of "eliminat[ing] extremes of partiality on both sides." *ibid.* [*Swain*, 380 U.S. at 219] thereby "assuring the selection of a qualified *and unbiased* jury," *Batson, supra*, at 91 (emphasis added).

Holland v. Illinois, 493 U.S. ___, 107 L.Ed. 2d 905, 919 (1990) (footnote omitted). As this Court stated in *Batson*:

> [A] prosecutor ordinarily is entitled to exercise permitted peremptory challenges "for any reason at all, as long as that reason is related to his view concerning the *outcome" of the case* to be tried . . .

Batson, 476 U.S. at 89 (quoting *United States v. Robinson*, 421 F.Supp. 467, 473 (D.Conn. 1976), *mandamus granted sub nom., United States v. Newman*, 549 F.2d 240 (2d Cir. 1977)) (emphasis added). There was no suggestion here that these two Latino jurors' "hesitancy" or Spanish language ability indicated that they would be partial to the defendant or unfair to the State. More importantly, as a general matter, similarly situated Spanish-speaking Latino jurors in other cases would have no inherent bias. Thus, by eliminating this reason for peremptorily challenging Latino jurors, the Court will not restrict the traditional and appropriate use of peremptory challenges.

Several State courts in following their own constitutions have required that, in *Batson*-type hearings, prosecutors cite the "specific bias" that the excluded juror is claimed to have. *State v. Gilmore*, 103 N.J. 508, 511 A.2d 1150 (1986); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979); *People v. Wheeler*, 22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978); *and see, Slappy v. State*, 503 So.2d 350, 355 (Fla. App. 1987), *aff'd*, 522 So.2d 18 (Fla.), *cert. denied*, 487 U.S. 1219 (1988). This serves the purpose of not only ferreting out pretextural reasons, but also of limiting peremptory challenges to eliminating juror bias which might affect case outcomes. *Batson* found that the Equal Protection Clause and the values that it embodied took precedence over the unfettered exercise of peremptory challenges. *Id.*, 476 U.S. at 98-99. These State court decisions reflect that same supremacy of constitutional values. This Court should be guided by the experience of these State courts and similarly reject the peremptory challenges at issue here because of the prosecutor's failure to articulate the "specific bias" of the jurors who were struck. Reasons unrelated to the purpose of peremptory challenges should be held to be unacceptable. The importance of a jury free from discrimination outweighs the use of peremptory challenges for any other purpose.

E. There Was A Nondiscriminatory Alternative To The Exclusion Of Latino Jurors

The concern, if real[20], raised by the prosecutor here of jurors not following the interpreter can be resolved by a nondiscriminatory alternative. See, *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). This underscores the discriminatory nature of the challenges. *Id.* More importantly, under the Fourteenth Amendment Equal Protection Clause, the State cannot take ethnic based actions when there are equally effective nondiscriminatory alternatives. *City Of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 102 L.Ed. 2d 854, 890 (1989). On this basis alone, this Court should reverse.

Concerns about Spanish language fluency can be addressed by the trial court without excluding bilingual Latino jurors. As is frequently done, the judge could instruct the jurors that if they do not agree with a translation, they can pass a note to the court to seek clarification. See, *United States v. Perez*, 658 F.2d 654, 662-663 (9th Cir. 1981); *People v. Silva*, 70 Cal.App. 3d 496, 139 Cal.Rptr. 1 (1977), *vacated on other grounds*, 20 Cal.3d 489, 143 Cal.Rptr. 212, 573 P.2d 430 (1978); *Santana*, 505 N.Y.S. 2d at 778. As clearly stated by the dissent below:

> If the interpreters employed by our criminal courts are as accurate as they should be, given that the defendant's liberty may depend upon the translator's words, then there should be no

[20] Both jurors were found by the trial court to be willing and able to follow the interpreter. A9-10. The prosecutor did not believe that a challenge for cause could be made. A9. In fact the prosecutor himself stated that he believed that "in their heart[s] they [the jurors] will try to follow [the interpreter's translation]." A3. Therefore, there is a real question of the factual basis of the challenges.

> disagreement between the translator and jurors fluent in Spanish. Surely, the majority does not intend to suggest, on the other hand, that if the translator is rendering a witness' testimony inaccurately into English, the State has a valid interest in permitting the errors to go unnoticed. And if the prosecutor's concern is merely that the jurors may become involved in disputes about nuance and word choice, that could be adequately addressed by an instruction that Spanish-speaking jurors are to adhere to the official translation only, and bring any errors they may discern to the attention of the court, but under no circumstances to the attention of their fellow jurors.

A44 (dissenting opinion). The Equal Protection Clause is better served by allowing Latinos to sit on juries that may hear Spanish language testimony, subject to the instructions of the Court, than by excluding them. There can be no justifiable state interest in excluding Latino Spanish language speakers from juries. *Batson*.

Conclusion

This Court must act to keep the jury process open to Spanish-speaking Latino jurors. It must close the loophole in the Fourteenth Amendment created by the New York State Court of Appeals and find that the explanation given here is a per se violation of *Batson*. To do so, affects in no way the ability to obtain an impartial jury through the use of peremptory challenges. The Fourteenth Amendment requires that Latino jurors not be excluded when concerns about their adherence to the official interpretation can be addressed through nondiscriminatory court instructions.

POINT II

THE FAILURE OF THE NEW YORK COURT OF APPEALS TO INDEPENDENTLY REVIEW THE TRIAL COURT'S FINDING OF NONDISCRIMINATION REQUIRES REVERSAL

A. Where There Is A Per Se Violation Of *Batson*, There Should Be A Reversal As A Matter Of Law

As petitioner has demonstrated, the prosecutor's proffered explanation is based on national origin and, therefore, violates the Equal Protection Clause of the Fourteenth Amendment, as a matter of law. *Batson*, 476 U.S. at 97-98. This Court has plenary authority to correct errors of federal law and should use that authority to reverse the decision of the New York State Court of Appeals.

B. Even If This Court Does Not Find A Per Se Violation, Plenary Review Is Still Required

Introduction

Even if this Court finds that there is no per se violation of the Equal Protection Clause, appellate review of trial court *Batson* decisions should be by independent plenary review. As discussed below, since 1935, this Court has consistently required independent review of claims of jury discrimination. The Court continually asserted that it was obligated to do this to protect the important democratic values at stake. That obligation extends to claims of jury discrimination under *Batson*. For without independent plenary review, *Batson* will be eviscerated.

The trial courts have the initial responsibility to insure the vitality of *Batson* by scrutinizing the totality of circumstances in order to assess not only the prosecutor's credibility, but also the race neutrality of the reasons offered. Unfortunately, there is considerable evidence that trial courts are accepting prosecutor's explanations without any probing inquiry. The appellate courts must be able to do more than defer to the these trial court decisions. They must independently evaluate the full factual circumstances established at the voir dire and then determine de novo whether, as a matter of law and fact, the prosecutor's proffers of nondiscriminatory reasons are race neutral according to Fourteenth Amendment standards. The New York State Court of Appeals failed to apply plenary de novo review and deferred entirely to the trial court. This matter must be reversed and remanded for a full and independent review.

Whatever standard of review is adopted by this Court, there must be a record which includes the facts disclosed by the trial court's probe of the prosecutor's explanation as well as the specific facts found by the trial court that led to its determination of no discrimination. At the very least, there must be a record of the voir dire. In this case there was neither. A remand first to the trial court is necessary to complete the record, and then plenary review by the New York appellate courts.

1. Plenary Review Is Required To Protect The Equal Protection Values Fundamental To Our Criminal Justice System

There is a thirty-two year history of plenary review of jury discrimination cases beginning with *Norris v. Alabama*, 294 U.S. 587 (1935) and continuing to *Whitus v. Georgia*, 385 U.S. 545 (1967).[21] *See, e.g., Pierre v. Louisiana,*

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[21] In 1977, this Court in *Castaneda v. Partida*, 430 U.S. 482 (1977), continued this line of precedents by rejecting sub

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306 U.S. 354 (1939); *Smith v. Texas*, 311 U.S. 128 (1940); *Fay v. New York*, 332 U.S. 261 (1947); *Cassell v. Texas*, 339 U.S. 282 (1950); *Avery v. Georgia*, 345 U.S. 559 (1953). The Court in these cases undertakes independent review based on the principle that:

> It is [in the Court's] province to "analyze the facts in order that the appropriate enforcement of the federal right may be assured," *Norris v. Alabama*, 294 U.S. 587, 590 (1935), and while the conclusions reached by the highest court of the state "are entitled to great respect . . . it becomes our solemn duty to make independent inquiry and determination of disputed facts . . . " *Pierre v. Louisiana*, 306 U.S. at 358 . . .

Whitus, 385 U.S. at 550.

The federal right of equal protection and the principle of nondiscrimination in the selection of jurors is fundamental to our legal system. It protects not only the defendant's right to a jury of his peers and the potential juror's right to equal treatment, but the very precepts and legitimacy of our democratic society. This Court has considered these values so central to our judicial system that it has always exercised plenary review to protect and ensure their continuing vitality. As explained by this Court in *Smith v. Texas*:

> [T]he question of [racial discrimination] decided [by the State trial and appellate court] rested upon a charge of denial of equal protection, a basic right protected by the Federal Constitution. And it is therefore our responsibility to

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silentio the suggestion by the dissenting opinion that a clearly erroneous standard of review applied. *Id.*, 430 U.S. at 507 (Stewart, J., dissenting).

> appraise the evidence as it relates to this constitutional right.
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> It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government. We must consider this record in light of these important principles.

Id., 311 U.S. at 130; *see, similarly, Pierre v. Louisiana*, 306 U.S. at 358.

Plenary review is not merely permitted, but is required to safeguard this right of equal protection.

> When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, this examination must be made. Otherwise, review by this Court would fail its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured.

Norris, 294 U.S. at 590.[22]

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[22] This Court has recognized that racial discrimination in our criminal justice system generally, and in the jury, specifically, is such an anathema to our democratic values that it cannot be countenanced even if it requires overturning the

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Independent review in jury discrimination cases by this Court has always entailed a de novo assessment of the factual evidence presented at the trial court level, as well as the inferences derived from such evidence. The totality of the circumstances and evidence are weighed, including the testimonial evidence of those responsible for selecting the petit jury venire or grand jury. For example, in *Norris*, the Alabama Supreme Court had found no discrimination in the selection of jurors for the grand jury in Jackson County, Alabama, where the defendants were indicted. The Alabama court's decision rested on the ground that even if no African American was on the jury roll, it was not established that race or color caused the omission. *Id.*, 294 U.S. at 593. The Alabama court pointed to the "high standard of qualifications for jurors and that

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conviction of a defendant for whom there was a strong showing of guilt. Thus, this Court has consistently held that discrimination in the selection of jurors cannot be harmless error. *See Vasquez v. Hillery*, 474 U.S. 254 (1986); *Rose v. Mitchell*, 443 U.S. 545, 551 & n.3 (and cases cited therein) (1979); *Cassell v. Texas*, 339 U.S. 282 (1950). Similarly, this Court indicated in *Batson* that "[i]f the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed." *Id.*, 476 U.S. at 100. These decisions refusing to apply the harmless-error analysis of *Chapman v. California*, 386 U.S. 18 (1967) to jury discrimination, even discrimination in the selection of a grand jury, underscore the importance of nondiscrimination to our judicial system. Its importance obviously goes beyond just insuring impartial fact finding by the jury. *Allen v. Hardy*, 478 U.S. 255 (1986); and see, *Rose v. Clark*, 478 U.S. 570, 587 (1986) (Stevens, J., concurring in the judgment).

the jury commissioner was visited with a wide discretion" as the neutral factors causing the elimination of African American jurors. *Id.*

This Court rejected the State court's finding. In doing so, the Court explicitly assessed the testimony of the jury commissioner, and found contrary to the trial court "[t]hat testimony leads to the conclusion that these or other [African-Americans] were not excluded on account of age, or lack of esteem in the community for integrity and judgment, or because of disease or want of any other qualification." *Id.*, 294 U.S. at 595. "[T]he evidence required a different result from that reached in the state court." *Id.*, 294 U.S. at 596.

Similarly, in *Norris*, with respect to the challenge to the trial venire in Morgan County, Alabama where the defendants were tried, the Court "carefully examined the testimony of the jury commissioners upon which the state court based its decision." *Id.*, 294 U.S. at 597. A member of the jury board testified that a list was made up which included the names of all male citizens of suitable age; that African American residents were not excluded from this general list; that in compiling the jury roll he did not consider race or color; that no one was excluded for that reason; and, that he had placed on the jury roll the names of persons possessing the qualifications under the statute. *Id.*, 294 U.S. at 598. This Court, based on its own assessment of the record and the totality of the circumstances, refused to credit the testimony. *Id.*, 294 U.S. at 598, 599.

Thus, in *Norris*, this Court rejected the determination of no discrimination by the trial court in Alabama as affirmed by the Alabama Supreme Court. That determination by the Alabama courts was based in part on

their assessment of the credibility of the jury commissioners' testimony of good faith and nondiscrimination. Yet, this Court rejected those findings relying on other evidence and other testimony. *Id.*, 294 U.S. at 598-599. This pattern of judicial review continued in all the jury cases right through *Whitus* in 1967.

The equal protection values protected through plenary review in these jury discrimination decisions of this Court are the exact same values intended to be protected by this Court's decision in *Batson*. This Court in *Batson*, relying on these earlier decisions emphasized that:

> The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice . . . Discrimination within the judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others." *Strauder*, 100 U.S. at 308.

Id., 476 U.S. at 87 (citations omitted). The need to protect these critical constitutional values in the *Batson* context necessitates the same standard of independent review as has been consistently applied by this Court in its past jury discrimination cases.

Plenary federal review has traditionally been mandated by this Court when other critical constitutional values are at stake that extend beyond the rights of the immediate parties involved and that safeguard the very tenets of our democratic system. Thus, in the First Amendment context, where the public's right to receive information is as much a concern as one individual's right to speak and

another individual's right not to be libeled, the Court has recently affirmed the principle of independent review to "determine whether the record establishes actual malice with convincing clarity." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514 (1984). Similarly, the Court has affirmed the requirement of plenary review in the context of determining the voluntariness of a criminal defendant's confession because that determination turns on "whether the techniques for extracting the statements, as applied to this suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitional means." *Miller v. Fenton*, 474 U.S. 104, 116 (1985).

A close review of the *Norris* line of cases, the voluntariness/due process cases like *Miller v. Fenton*, and the First Amendment cases like *Bose* demonstrates that the decision to apply independent and plenary review is based on the importance of the constitutional question and the need to have continuing appellate court scrutiny to shape the law. For example in *Bose*, the Court noted:

> A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment. Where the line is drawn varies according to the nature of the substantive law at issue. *Regarding certain largely factual questions in some areas of the law, the stakes – in terms of impact on future cases and future conduct – are too great to entrust them finally to the judgment of the trier of fact.*

Id., 466 U.S. at 501 n.17. The findings of jury discrimination, voluntariness, or actual malice are ultimately questions of the constitutionality of the circumstances presented, i.e., questions in which the historical or subsidiary facts are measured by a legal standard. *Cf., Maggio v. Fulford*, 462 U.S. 111, 118 (1983) (White, J., concurring). In all these settings, the Court was concerned that these findings be guided by independent appellate court review in order to shape the "law" component of the determination. Although lower court decisions on these issues contain some factual determinations of both credibility and the mental processes or intent of a witness, this Court has not left the ultimate determinations solely in the hands of the trial judge or the jury. The need for independent review was well described by the dissenting opinion below:

> [I]f our review of the prosecutor's conduct is to become merely a matter of identifying undisturbed findings of fact with some support in the record, or deferring to the trial court and Appellate Division or to the prosecutor's assertion of some ostensibly neutral ground, then the role of this court in defining and protecting defendant's nascent constitutional right has been virtually surrendered at the outset. While the Trial Judge's observations of the unfolding events are of course important, there is still a significant role for this court in clearly articulating the standard and then determining the law question whether the People have satisfied that standard.

A39-40 (dissenting opinion); *see, also, People v. Johnson*, 47 Cal.3d 1194, 1285, 255 Cal.Rptr. 569, 623, 767 P.2d 1047, 1101 (1989) (Mosk, J. dissenting), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1501 (1990).

The Court's statement in footnote 21 of *Batson* that "a reviewing court ordinarily should give [the trial court's]

findings [of credibility] great deference" is entirely consistent with plenary review.[23] For example, *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S.___, 105 L. Ed. 2d 562, 589 (1989) held that although credibility determinations would be reviewed under the clearly erroneous standard, the reviewing court was required to independently examine the totality of the circumstances to determine whether there had been a violation of the First Amendment.

Providing independent and plenary review of these important constitutional claims, including *Batson* claims, in no way denigrates the fact finding abilities of the trial court. Appellate courts still give deference to the trial court's findings of historical or subsidiary facts as well as credibility. However, the appellate courts independently make their own determination of the constitutionality of the circumstances at issue based on the constitutional values that are being protected. In *Batson* cases, this Court and other appellate courts need to define the parameters of what is a permissible explanation and what is not. Is the reason proffered race neutral? When is a reason not sufficiently specific? Are hunches based on things not in the record good enough? Does the prosecutor have to articulate the "specific bias" of the excluded juror? The federal courts and particularly this Court as the guardians of the Fourteenth Amendment must answer these and other questions. There is no reasoned basis to reject

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[23] To the extent footnote 21 may have meant that review of *Batson* determinations are to be reviewed solely under the clearly erroneous standard, it is pure dicta and not controlling on this Court. *Wainwright v. Witt*, 469 U.S. 412, 422 (1985).

the teachings of *Norris* and its progeny.[24] Claims of jury discrimination demand plenary review. "[T]he rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the fact finding function be performed in the particular case by a jury or a trial judge." *Bose*, 466 U.S. at 501.

Not only must this Court provide plenary review to protect the values of the Fourteenth Amendment, but the Constitution commands that other courts of appellate review, both state and federal, should do so as well.[25] The

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[24] As this Court stated in an analogous circumstance:

> For several reasons we think that it would be inappropriate to abandon the Court's longstanding position that the ultimate question of the admissibility of a confession merits treatment as a legal inquiry requiring plenary federal review. We note at the outset that we do not write on a clean slate. "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions." *Moragne v. States Marine Lines, Inc.* 398 US 375, 403, (1970). . . . nearly a half century of unwavering precedent weighs heavily against any suggestion that we now discard the settled rule in this area.

Miller v. Fenton, 474 U.S. 104, 115 (1985).

[25] See, for example, the following cases which pursuant to *Bose* hold that plenary review is mandated when a state appellate court reviews whether there was sufficient evidence at trial of "malice," "obscenity," "incitement," or the "public figure" status of the plaintiff: *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 724 P.2d 562, 568 (1986); *Brown v. Kelly Broadcasting Company*, 48 Cal.3d 711, 257 Cal.Rptr. 708, 771 P.2d 406, 429 (1989); *McCoy v. Hearst Corp.*, 42 Cal.3d 835, 231 Cal.Rptr. 518, 727 P.2d 711, 715 (1986), *cert denied*, 481 U.S. 1041 (1987); *Olson*

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New York State Court of Appeals failed in its duty under the Fourteenth Amendment to provide independent review and merely deferred to the trial court. This matter must be remanded for consideration under the appropriate standard.

2. Without Plenary Review Batson Will Be Eviscerated

Plenary review by the appellate courts is required to ensure the continuing vitality of *Batson*. The combination of: (1) the ease by which prosecutors can consciously or unconsciously evade detection for racially based peremptory challenges; and, (2) the willingness of trial courts to accept explanations of prosecutors rather than find them both racists and liars, requires that the appellate courts closely scrutinize *Batson* determinations of the trial courts.

Prosecutors and trial judges work together day after day, for long periods of time, trying case after case. They are part of the same criminal justice apparatus, often being elected by the same political parties or being appointed by the same officials. This close institutional relationship breeds a collegial familiarity if not actual

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v. State Board for Community Colleges and Occupational Education, 759 P.2d 829, 830 (Colo.App. 1988); *Costello v. Capital Cities Communications, Inc.*, 125 Ill. 2d 402, 532 N.E.2d 790, 797 (1988); *Yakubowicz v. Paramount Pictures Corporation*, 404 Mass. 624, 536 N.E.2d 1067, 1071 (1989); *City of Urbana v. Downing*, 43 Ohio St. 3d 109, 539 N.E.2d 140, 146 (1989); *Fitzpatrick v. Philadelphia Newspapers, Inc.*, 567 A.2d 684, 687 (Pa.Super. 1989); *Curran v. Philadelphia Newspapers, Inc.*, 376 Pa. Super. 508, 546 A. 2d 639, 643 (1988); *Lyons v. Rhode Island Public Employees Council 94*, 559 A.2d 130, 134 (R.I.), *cert. denied*, 110 S.Ct. 238 (1989).

friendship. In this setting, it may be very difficult to make a finding that a colleague is practicing racial discrimination. It is not the same as findings of discrimination by trial courts in cases involving employment or housing where the defendants are ordinarily unknown to the judge or, at the very least, not friends or colleagues.[26] This institutional relationship between state officials helps explain in part the willingness of some judges to accept without any inquiry the facially neutral explanations of prosecutors. *See, e.g, State v. Slappy*, 522 So.2d 18, 22 (Fla.), *cert. denied*, 487 U.S. 1219 (1988); *Ward v. State*, 293 Ark. 88, 733 S.W.2d 728 (1987); *People v. Hall*, 35 Cal. 3d 161, 168, 197 Cal. Rptr 71, 672 P.2d 854 (1983); *Stanley v. State*, 313 Md. 50, 542 A.2d 1267, 1281 (1988); *State v. Butler*, 731 S.W.2d 265, 269 (Mo. App. 1987); *Jackson v. Commonwealth*, 8 Va. App. 176, 380 S.E.2d 1, 6 (1989).

Appellate review is necessary to have an impartial view of the cold record facts surrounding the voir dire without any inappropriate collegial assumptions about the honesty and integrity of the prosecutor. One appellate judge candidly described the problem:

> The difficult question to answer, though, is what constitutes an adequate race-neutral explanation? How plausible must it be? How much in-depth explanation must the prosecutor give in order to support his race-neutral explanation? How particular must his reason be? Must the prosecutor's reason amount to something more than a suspicion or hunch that the prospective juror will not be a fair juror to his side? If the prosecutor gives a racially neutral explanation,

[26] Also, unlike testimony at trial, prosecutors are often not under oath when they offer their responses to a prima facie case.

> such as one of the above reasons ["Because he was the same age as the defendant"] or the one given in this cause, and the trial judge believes him, will that, standing alone, be sufficient? If that is the law, excepting the situation where the prosecutor admits on the record that he was racially motivated when he exercised his peremptory strikes . . . I believe that, much like this Court's records reflect the number of times a trial judge has disbelieved a law enforcement official concerning the admissability of a defendant's confession, *it will be the rare case where the trial judge disbelieves a prosecuting attorney and finds that the prosecutor failed to overcome the defendant's prima facie case of racial discrimination* . . .

Keeton, 749 S.W.2d at 878-879 (concurring opinion) (citation omitted and emphasis added); *see, also, People v. Johnson*, 47 Cal.3d at 1291, 255 Cal.Rptr. at 627, 767 P.2d at 1105. (Mosk, J., dissenting).

This Court has recognized the reluctance of familiar institutional actors to find fault with those with whom they work. In *Rose v. Mitchell*, this court stated:

> Federal habeas corpus review is necessary to ensure that constitutional defects in the state judiciary's grand jury selection procedure are not overlooked by the very state judges who operate that system. There is strong reason to believe that federal review would indeed reveal flaws not appreciated by state judges perhaps too close to the day-to-day operation of their system to be able properly to evaluate claims that the system is defective.

Id., 443 U.S. at 563.

Plenary review is especially needed here where the prosecutor's reason is integrally related to national origin. As the dissenting judges stated below, there must be

heightened scrutiny for reasons of this type. The prosecutor's assertions must be carefully examined in light of all the factual circumstances in the voir dire. "[A] reason that is grounded largely in speculation rather than facts uncovered in a voir dire examination, as revealed by the record, should not be accepted." A41 (dissenting opinion).[27]

Already many commentators are confirming Justice Marshall's prediction that "[a]ny prosecutor can easily assert feasibly neutral reasons for striking a juror" and therefore "the protection erected by the [*Batson* opinion] may be illusory." *Batson*, 476 U.S. at 106 (Marshall, J. concurring). *See, e.g.*, Stewart, *Court Rules Against Jury Selection Based on Race*, 72 ABAJ 68, 70 (July, 1986) ("[A]ny prosecutor's office could develop a list of 10 or 15 standard reasons for striking a juror: the juror was 'inattentive' or dressed poorly and thus 'did not seem to respect the system of justice' "); Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. Chi. L. Rev. 153, 173-176 (1989); Note, *Rebutting the Inference of Purposeful Discrimination In Jury Selection Under Batson v. Kentucky*, 57 UMKC L. Rev. 355, 360 (1989); Note, *Batson v. Kentucky: Two Years Later*, 24 Tulsa L.J. 63, 85 (1988). Proffers of arbitrary and meaningless neutral explanations have been accepted because of the lack of sufficiently objective criteria. As stated by one commentator:

> A black who wishes to serve on a jury must be careful to look directly at the prosecutor. The Fifth Circuit has upheld an exclusion primarily

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[27] While petitioner believes that there is a per se violation of *Batson*, alternatively, this court can find a violation for the reasons urged by the dissent below.

> on a prospective juror's failure to maintain eye contact. The prospective juror must not look too much, however. The Seventh Circuit has upheld an exclusion that a prosecutor explained by saying "Mr. Declinton [sic, Declinton was the prospective juror's first name] was sitting directly to my right, only a space of approximately four feet from me, and both yesterday and today he spent a very great deal of time in examining me in a way which I felt was in the end becoming rather hostile."
>
> Courts have upheld exclusions grounded on a prospective juror's "posture and demeanor," "poor attitude in answering voir dire questions," "nodding . . . a little bit too much toward [defense counsel] and not enough towards me," "demeanor and how he answered the questions," and even exuding "something [that] seemed unfavorable."

Alschuler, 56 U. Chi. L. Rev. at 175-176 (citations omitted).

Judge Higginbotham of the United States Court of Appeals for the Third Circuit has similarly observed:

> Justice Marshall predicted in his *Batson* concurrence that the decision would allow courts to remedy only the most flagrant instances of racial discrimination in jury selection. 476 U.S. at 105, 106 S.Ct. at 1727 (Marshall, J., concurring). Time and experience have proved him correct. Recent commentators note that *Batson* has left prosecutors free to strike jurors based on what amounts to patent stereotypes. *See, e.g.*, Serr and Manly, *Racism Peremptory Challenges and the Democratic Jury*, 79 J.Crim.Law & Criminology 1, 43-47 (1988); Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U.Pa.L.Rev. 1365, 1420 (1987) (prosecutor may seek to justify strike on arbitrary grounds such as speech, hair style, demeanor).

United States v. Clemons, 892 F.2d 1153, 1162 (3d Cir. 1989) (Higginbotham, J., concurring), *cert. denied*, 110 S.Ct. 2623 (1990).

Objectively verifiable measures of race neutrality must be considered by the trial court and be independently reviewable by the appellate courts. Otherwise, prosecutors' proffers which are the functional equivalent of good faith assertions will continue to be sufficient to overcome a prima facie case. This may be the only way to prevent the unconscious, but discriminatory operation of the jury selection system. *Batson*, 476 U.S. 106-107 (Marshall, J. concurring);[28] *United States v. Clemons*, 892 F.2d at

[28] As explained by Justice Marshall:

"[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal." *King* [v. *County of Nassau*, 581 F. Supp. 493, 502 (E.D.N.Y. 1984)]. A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. As Justice Rehnquist concedes, prosecutors' peremptories are based on their "seat-of-the-pants instincts" as to how particular jurors will vote. [citations omitted] Yet "seat-of-the-pants instincts" may often be just another term for racial prejudice. Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels – a challenge I doubt all of them can meet. It is worth remembering that "114 years after the close of the War Between the States and nearly 100 years after *Strauder*, racial and

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1162 (Higginbotham, J., concurring); *see also*, Kavanaugh, *Defense Presence and Participation: A Procedural Minimum for Batson v. Kentucky Hearings*, 99 Yale L.J. 187, 198-199 (1989); *Developments in the Law: Race and the Criminal Process*, 101 Harv. L. Rev. 1472, 1581 (1988); *see generally*, Lawrence, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987).

Appellate review should look beyond the mere assertions of nondiscrimination and examine the available objective facts to determine whether as a matter of law and fact the exclusion of a juror was based on race neutral criteria. The State courts have already begun to lay out some of the criteria for determining whether discrimination exists. For example, the Alabama Supreme Court recently listed several factors that may lead to a finding of discrimination:

1. The reasons given are not related to the facts of the case.
2. There was a lack of questioning to the challenged juror, or a lack of meaningful questions.
3. Disparate treatment – persons with the same or similar characteristics as the challenged juror were not struck.
4. Disparate examination of members of the venire, e.g., a question designed to provoke a certain response that is likely to disqualify the

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other forms of discrimination remain a fact of life, in the administration of justice as in our society as a whole." *Rose v. L. Mitchell*, 443 U.S. 545, 558-559, 61 Ed. 2d 739, 99 S.Ct. 2993 (1979), quoted in *Vasquez v. Hillery*, 474 U.S. 254, 264, 88 L.Ed.2d 598, 106 S.Ct. 617 (1986).

Batson, 476 U.S. 106-107 (Marshall, J. concurring).

juror was asked to black jurors, but not to white jurors.

5. The prosecutor, having 6 preemptory challenges, used 2 to remove the only 2 blacks remaining on the venire.

6. "[A]n explanation based on a group bias where the group trait is not shown to apply to the juror specifically." *Slappy*, 503 So.2d at 355. For instance, an assumption that teachers as a class are too liberal, without any specific questions having been directed to the panel or the individual juror showing the potential liberal nature of the challenged juror.

Ex Parte Branch, 526 So.2d 609, 624 (Ala. 1987) (citations omitted); *see similarly, Keeton v. State*, 749 S.W.2d 861, 868 (Tex.Cr.App. 1988) (en banc); *State v. Slappy*, 522 So.2d at 22.

Plenary review may not be able to catch all the conscious and unconscious racially based peremptory challenges, but without it, there is no hope of *Batson* ever being a bar to discrimination. While trial courts can be relied on to catch many of the more flagrant violations of *Batson*, there is a need for independent review by the appellate courts. The appellate courts must set the standards which will deter trial courts from accepting prosecutors' explanations without any probing inquiry into those explanations because of their own unconscious racism or feelings of collegiality. When appellate review finds that race or ethnicity is more likely than not the basis of a prosecutor's peremptory challenge, even if the trial court found otherwise, the Equal Protection Clause requires that there be a reversal and new trial. It is only through this form of independent review that the standards for *Batson* can be properly set and enforced.

3. There Must Be An Adequate Record

In order for there to be plenary review there must be an adequate record. This requires (1) that the trial court probe the prosecutor's explanation; and, (2) that the trial court record the specific factual findings that underlie its conclusion of nondiscrimination. Absent a probing inquiry by the trial court and a record of its findings, there must be a transcript of the voir dire to allow for appellate review. Here, there was neither a voir dire record nor specific factual findings; appellate review under any standard was not possible. But, plenary review was particularly impossible.

The trial court cannot simply accept on its face the explanation of the prosecutor. The Alabama Supreme Court described the duty of the trial court to probe the explanation as follows:

> The trial judge cannot merely accept the specific reasons given by the prosecutor at face value, . . . the judge must consider whether the facially neutral explanations are contrived to avoid admitting acts of group discrimination. . . . This evaluation by the trial judge is necessary because it is possible that an attorney, although not intentionally discriminating, may try to find reasons other than race to challenge a black juror, when race may be his primary factor in deciding.

Ex Parte Branch, 526 So.2d at 624 (citations omitted); *see also, State v. Slappy*, and cases cited thereafter on page 39

The trial court has an obligation independent of the defendant to insure nondiscrimination.[29] *Batson*

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[29] The prosecutor has an equal duty to substantiate on the record the factual bases of the peremptory challenges. *People v. Johnson*, 47 Cal.3d at 1287, 255 Cal.Rptr. at 625, 767 P.2d at 1103 (Mosk, J., dissenting); and see dissenting opinion below at A41-42.

recognized, as did the earlier jury discrimination cases, that the integrity of the judiciary is at risk if discrimination is allowed to be practiced.

> The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.

Id., 476 U.S. at 87 (citations omitted).

Here, perhaps because the trial took place only a few months after *Batson* was decided, the trial court failed in its constitutional duty to probe the explanation of the prosecutor. There was no consideration of the factors that might lead to a finding of discrimination based on pretext. As the dissent below noted, the record does not indicate whether non-Latinos were questioned about their Spanish language ability. A42. Nor did the trial court's determination reflect whether non-Latinos who "hesitantly" answered other questions regarding their obligations as jurors were also struck. These factual inquiries are basic to the ability of the appellate court to review a finding of nondiscrimination. The matter should be remanded to allow the trial court to fully probe the prosecutor's reasons, consider the factors listed by the Alabama court in *Ex Parte Branch* and record its findings. *Pullman-Standard v. Swint*, 456 U.S. 273, 291-293 (1982).

Courts, both State and Federal, consistently require that there be record support for the trial court's determination. *See, e.g., Jackson*, 380 S.E.2d at 6 ("The record must contain findings by a trial judge, not just a conclusion, in order to facilitate both the initial inquiry and appellate review."); *Stanley*, 542 A.2d at 1277, n.11 ("We

emphasize here the need for the record to contain not only specific findings by the judge, but also information to support those findings; information such as the number of blacks and whites on the venire, the numbers of each stricken for various reasons, the reasons underlying strikes for cause, pertinent characteristics of jurors excluded and retained, relevant information about the race of the defendant, the victim and potential witnesses, and so forth."); *Tolbert v. State*, 315 Md. 13, 553 A.2d 228, 233, n.8 (1989); and, *see*, 28 U.S.C. 753 (requiring that the court reporter in criminal cases record all phases of jury selection, including voir dire). Here, no specific findings were made, nor was there a transcript of the voir dire. The absence of a record requires a remand. *Cf., Hardy v. United States*, 375 U.S. 277 (1964).

Conclusion

Plenary review is mandated by the Fourteenth Amendment. The failure of the New York State Court of Appeals to provide plenary review requires that this matter be remanded back to the New York courts to complete the record and review it properly under the appropriate standard.

CONCLUSION

The decision below should be reversed and a finding of a per se violation of the Fourteenth Amendment should be entered. Alternatively, this matter should be remanded to the New York courts to complete the record and provide a full plenary review of the trial court's determination.

Dated: November 28, 1990

Respectfully submitted,

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